

MESA WIND DEVELOPERS
ZOND SYSTEMS, INC.

IBLA 94-409

Decided November 13, 1998

Appeal from a decision of the Palm Springs-South Coast Resource Area, Bureau of Land Management, denying rental waiver for 1993 and requiring payment of rentals for 1993 and 1994 for a right-of-way issued for a wind energy generation park. CA-11688-A.

Reversed.

1. Accounts: Refunds--Federal Land Policy and Management Act of 1976: Rights-of-Way--Rent--Rights-of-Way: Federal Land Policy and Management Act of 1976

Pursuant to 43 C.F.R. § 2803.1-2(b)(2)(ii), BLM is authorized to charge less than fair market rental value for a right-of-way for a wind energy generation park when the holder provides without charge, or at a reduced rate, a valuable benefit to the public. A BLM decision denying a rental waiver will be reversed where correspondence between the holder of the right-of-way and BLM shows that the holder agreed to relocate certain wind turbine generators for the benefit of a neighboring community in return for BLM's funding the relocation through monies otherwise payable to BLM for rent. However, in the absence of express statutory authority, no interest on the funds claimed by the holder may be paid by BLM.

APPEARANCES: Donald I. Berger, Esq., Los Angeles, California, for Appellants.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Mesa Wind Developers (Mesa) and Zond Systems, Inc. (Zond), have appealed from a Decision of the Palm Springs-South Coast Resource Area Manager, Bureau of Land Management (BLM), dated February 2, 1994, denying rental waiver for 1993 and requiring payment of rentals for 1993 and 1994 for a right-of-way issued for a wind energy generation park.

On January 26, 1983, BLM issued right-of-way grant CA-11688-A to PanAero Corporation ^{1/} for the construction, operation, and maintenance of a wind energy generation electrical system pursuant to section 501 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1994), and implementing regulations in 43 C.F.R. Part 2800. The lands included in the grant comprising approximately 477 acres are located within secs. 27, 33, and 34, T. 2 S., R. 3 E., and sec. 4, T. 3 S., R. 3 E., San Bernardino Base Meridian, California. A plan of operations was submitted on May 24, 1983, and on August 16, 1983, BLM issued a Notice to Proceed (NTP). A revised plan of operations was submitted on March 20, 1984, and on April 11, 1984, BLM issued a decision amending the right-of-way grant and a second NTP. On June 26, 1984, BLM approved assignment of the right-of-way to Mesa Wind Developers, a California joint venture comprised of Zond, AV Wind Energy II, and PanAero California, Ltd.

The right-of-way authorized Zond, as Mesa's authorized agent and general partner, to construct "small" wind turbine generators (WTG's), standing 155 feet or less in height, "medium" WTG's, standing between 155-200 feet, and "large" WTG's standing 250 feet or more. (Right-of-way Grant at 12; Statement of Reasons (SOR) Ex. A.; SOR at 2.)

During 1989, Zond had several meetings with residents of Bonnie Bell, a neighboring community, and BLM to discuss resident concerns regarding visual and noise impact on the community caused by the WTG's. These concerns focused on 22 WTG's located on the edge of a ridge on the right-of-way overlooking the Bonnie Bell subdivision below. This ridge was considered to be a "highly advantageous location" for generating wind production. (SOR at 4.) These WTG's were each constructed on 80 foot towers and were referred to by Zond and BLM as "Row One." (SOR at 2.)

On March 6, 1989, Zond filed a request to modify the original Plan of Operations to allow the relocation of 63 existing WTG's (known as Phase I) from low wind energy production sites to areas within the existing grant that would produce a higher rate of wind-generated electrical power. BLM countered this proposal by requesting that Zond remove and relocate the Row One WTG's. (Environmental Assessment No. 90-21 dated January 26, 1990, at 1.)

On January 2, 1990, Zond made a general proposal for relocation of the Row One WTG's in conjunction with relocation of the 63 WTG's which were not producing adequate levels of energy. (SOR Ex. B.) In a letter dated January 22, 1990 (SOR Ex. C), Zond proposed the relocation of the Row One WTG's under the following conditions: (1) appropriate sites within the right-of-way property, exclusive of the 63 sites needed for relocation of the 63 under-producing WTG's, would need to be available for the 22 relocated Row One WTG's, and these sites would need to produce wind

^{1/} On Nov. 1, 1993, PanAero Corporation advised BLM that it had changed its name to PAMC Management Corporation.

energy which equaled or exceeded the wind energy production by the existing Row One WTG's; and (2) the funding for the proposed relocation of the Row One WTG's would be through the utilization of monies otherwise payable by Mesa to BLM for rent which would be deposited into a rent offset account. (SOR Ex. C. at 2-3.)

Also in this letter, Zond stated that the proposal assumed that the relocation costs would average \$30,000 per WTG. Zond explained that to the extent the relocation cost could be reduced (by the use of 80 foot towers at some sites in lieu of 140 foot towers for instance) a corresponding lesser amount would be drawn from the rent offset account. To the extent that the relocation costs were greater than \$30,000 per WTG on average, a greater amount would be withdrawn. Zond noted that it would install anemometers at potential new sites when 140-foot towers became available. (SOR Ex. C. at 3.)

On January 26, 1990, BLM issued a Decision amending Mesa's right-of-way grant to conform with the boundaries of the final map at the completion of the relocation project, modifying the plan of operations to allow the relocation of 85 WTG's, and enclosing an NTP for the relocations. (SOR Ex. D.)

In a letter to BLM dated January 29, 1990, Zond confirmed a verbal agreement with BLM regarding the proposal. Zond stated that relocation of all Row One WTG's could be completed by April 1992 assuming that adequate funds were available for relocation costs, the average relocation costs were \$30,000 per WTG as initially estimated, and sufficient sites with wind power levels equal to or greater than Row One for relocation of the Row One WTG's were available. Zond requested that BLM notify it if BLM did not agree with the contents of the letter. (SOR Ex. E.)

BLM responded by letter dated January 31, 1990, accepting Zond's proposal to relocate the Row One WTG's. In this letter BLM acknowledged its request that Zond "remove all WTGs in Row One and relocate them away from the east ridge overlooking Bonnie Bell. You [Zond] informed the BLM that your organization is willing to relocate these WTGs, provided the BLM would waive annual rent to offset the cost of relocation." Further, BLM stated that it would "issue a decision setting aside rental payments pursuant to a mutually agreed upon schedule of removal and based upon the actual costs associated with relocating WTGs from Row One." Regarding the cost of relocation, BLM specified that "[a]ctual cost figures to be used must be competitive and the lowest reasonable cost to safely remove and relocate these structures." (SOR Ex. F.)

In a letter to BLM dated February 13, 1990, Zond confirmed its understanding of the NTP dated January 26, 1990. Zond stated that it understood that the relocation of the 22 Row One WTG's was contingent upon the relocation costs being funded by BLM and on the availability of relocation sites having power levels equal to or greater than the current Row One sites. In conclusion, Zond requested that BLM notify it if the letter did not reflect BLM's understanding of the NTP. (SOR Ex. G.)

On March 6, 1990, BLM issued a second NTP with the relocation. (SOR Ex. H.)

On March 22, 1990, Zond wrote to BLM for the purpose of reconfirming the conditions of relocation as previously set forth. The letter stated that Zond's estimated average costs for the Row One relocation had increased to \$33,000 per WTG, and that Zond expected to install 140-foot anemometer towers to quantify the wind power levels available at certain sites in order to determine their suitability. BLM signed the statement at the end of the letter that it "hereby agrees with and confirms the contents of the letter." (SOR Ex. I.)

By letter dated August 28, 1990, Zond informed BLM that 28 of the 63 WTG's had been relocated, and that the data collected from the anemometer readings "indicates the suitability of the area" for the relocation of the first 6 of the 22 Row One WTG's. Based upon the costs associated with the initial relocation of the 63 WTG's, Zond stated that the costs associated with the Row One relocation were expected to be approximately \$39,000 per WTG. Zond also provided BLM with documentation on how the \$39,000 per WTG estimate was calculated. Zond requested that BLM confirm its acknowledgement and agreement with the contents of the August 28 letter by signing it and returning it to Zond, which BLM did. (SOR Ex. J.)

By Decision dated January 16, 1991, BLM waived "the annual rental payment for Calendar Year 1991 in consideration of the public benefit such relocation will provide to the local residents of Bonnie Bell and the BLM," and authorized Zond to apply the rent offset to Row One relocation costs. (SOR Ex. K.)

By Decision dated January 22, 1992, BLM waived one-half of the rental payment for 1992, again "in consideration for the public benefit that the WTG relocation project will provide to the local residents of Bonnie Bell," and directed Zond to deposit the first 6 months of the 1992 rental payment into the Row One rent offset account. BLM stated that it would issue a decision prior to July 1, 1992, to waive the balance of the rental for 1992, which was needed to recover the actual cost of the WTG removal. (SOR Ex. L.)

In a June 11, 1992, letter, Zond requested that BLM waive the remainder of the 1992 annual rental payment. Zond enclosed a cost summary sheet which indicated that the costs incurred through May 23, 1992, were approximately \$759,514 or \$39,000 per WTG and projected total relocation costs of \$864,414. Zond stated the projected cost was "close to the original estimate of \$39,000 per turbine that was presented in [its] letter of August 28, 1990" that BLM acknowledged. The cost summary reflected the tower labor, tower equipment, and tower material costs. Zond requested that BLM contact it if BLM had any questions. (SOR Ex. M.)

BLM issued a Decision dated June 16, 1992, waiving "the remaining one half of the annual rental payment for Calendar Year 1992 in consideration of the public benefits of the WTG relocation project." Also, BLM instructed Zond to deposit the rent into the rent offset account and to submit a final tally of actual costs of relocation to BLM at the completion of the relocation project. (SOR Ex. N.)

By letter dated June 24, 1992, Zond notified BLM that there was a discrepancy between the bank statement numbers for the principal amount in the rent offset account and the numbers given in BLM's June 16, 1992, waiver Decision. A Conversation Record in the case file shows that BLM telephoned Zond on June 29, 1992, to inform Zond that it concurred with the amount described in Zond's letter of June 24, 1992.

On January 12, 1993, Zond informed BLM that it intended to meet its 1993 rental obligation by depositing the 1993 rent into the rent offset account. Zond proposed to withdraw \$98,295 from the account to cover costs it had advanced in relocating the Row One WTG's. Attached to Zond's letter was a Relocation Cost Summary which listed the total costs as \$875,323, or \$39,787 per WTG. (SOR Ex. O.)

In a February 9, 1993, letter, BLM directed Zond to deposit the 1993 rental into the rent offset account, but not withdraw funds until the project was completed. (SOR Ex. P.) By letter dated June 2, 1993, Zond submitted a final accounting to BLM which showed that Zond's total cost for the relocation project was \$876,388, an average of \$39,836, per WTG. Zond requested authorization to reimburse itself the balance owing of \$120,700. (SOR Ex. Q.)

By letter dated September 3, 1993, BLM informed Zond that it wished to discuss several items in the cost summary, including "[a]n inventory of the towers and their height prior to the relocations [sic] project." (SOR Ex. R.)

In a December 1, 1993, BLM memorandum to the ADM, Division of Lands and Renewable Resources, the ADM, Division of Operations, Glenn N. Kline, noted that a meeting was held with Zond on September 7, 1993, at which Zond presented data on the costs incurred for the Row One relocation.

On February 2, 1994, BLM issued a Decision denying the rental waiver for the 1993 annual rental. BLM stated that after reviewing the costs submitted by Mesa it had determined that all of the costs which Mesa identified as incidental to the removal/relocation project may not be appropriate. "The information submitted by Mesa incorporated the costs associated with the erection of towers WTGs [sic] that are substantially higher (larger) than those originally placed in Row 1," BLM stated, adding that the labor and materials costs associated with these larger "tower extensions" were costs which could not properly be incorporated into the monies considered as appropriate for "rental waiver." Therefore BLM disallowed the rental waiver for an amount of \$191,483. (SOR Ex. S.)

BLM noted that Mesa's costs for relocation of the 22 WTG's was \$876,388. Disallowing \$191,483 for the tower extensions, BLM concluded that the allowable waiver was \$684, 905. BLM pointed out that the previously approved rental waivers for 1990, 1991, and 1992 totalled \$713,553, i.e., \$28,648 more than the total cost shown by Mesa less the \$191,483 cost associated with the tower extensions not approved by BLM. Based on these figures, BLM concluded that the total rental waiver provided to Mesa was \$713,553, an amount equal to the rental waivers for 1990, 1991, and 1992. Therefore, BLM stated, the entire \$237,851 annual rental owed by Mesa for 1993 would not be refunded to Mesa in the form of a rental waiver. BLM required Mesa to withdraw the monies deposited in the rental account for 1993 and disburse them to BLM. Id.

In their SOR, Appellants assert that the evidence does not support BLM's Decision to disallow reimbursement of funds Zond expended on relocation of the Row One WTG's. Appellants contend that the correspondence between the parties demonstrates that BLM's refusal to complete the reimbursement to Zond is a breach of the express agreements reached between the parties prior to the relocation of the Row One WTG's. (SOR at 13.)

Appellants contend that the correspondence between Zond and BLM demonstrates that the relocation of Row One WTG's was expressly conditioned on BLM funding the actual costs of the relocation, and on the level of wind energy production not being compromised by the relocation. (SOR at 13, 16.) Appellants note that BLM expressly acknowledged and agreed to these conditions before Zond would proceed with the relocation. See correspondence dated January 31, 1990, February 13, 1990, March 6, 1990, and August 28, 1990. (SOR at 15-16.)

Appellants assert that BLM knew at the outset of the project that 140-foot towers would be needed to achieve equivalent wind production. In its relocation proposal submitted January 22, 1990, Zond advised BLM that anemometer readings at a 140-foot height would be necessary to determine if specified alternative sites were "sufficient" to meet the energy production precondition to the Row One relocation. (SOR at 18, SOR Ex. C.)

Appellants point out that the \$39,000 estimate approved by BLM in its August 28, 1990, letter agreement was based upon cost data developed from the installation of 28 of the 63 WTG's to be relocated in Phase I, and BLM knew at the time that all of these 28 WTG's were located on 140-foot towers. (SOR at 18.) In addition to this implicit approval of the 140-foot towers, according to Zond, BLM inspected the areas where the 63 WTG's had been relocated, and approved the 140-foot towers at these locations, prior to the relocation of the Row One WTG's. Appellants assert that in accordance with the NTP, prior to staking the foundations for the 140-foot towers for the Row One WTG's, Zond received the express approval of a BLM compliance engineer who confirmed by visual inspection from the Bonnie Bell Subdivision that the 140-foot towers proposed by Zond would not give rise to new concerns from the Bonnie Bell community. (Declaration of Rod Dees, Construction Manager for Zond, dated April 20, 1994.)

Appellants note that BLM acknowledged and agreed with the contents of the August 28, 1990, letter stating that Zond's estimated relocation costs would be approximately \$39,453 per WTG and that the total relocation costs would therefore exceed \$867,000. Appellants point out that this estimate compares to an actual cost of \$876,388, or less than a 1-percent variance.

Appellants assert that the proximity of actual costs to those estimated in August 1990, and the fact that the estimate was based upon cost information developed in conjunction with the relocation of 28 Phase I WTG's installed on 140-foot platforms, illustrates the reasonableness with which Zond conducted the relocation activities. (SOR at 20.)

Referring to its correspondence of August 28, 1990, and June 11, 1992, Appellants explain that Zond made efforts to keep BLM advised of the likely cost expenditures at each step in the relocation process. (SOR at 20, 21.)

Appellants assert that the expenditures associated with the tower extensions were specifically disclosed, and at no time prior to the waiver denial did BLM ever object to Zond's cost estimates or in any way indicate that the costs incurred with respect to the 140-foot tower extensions were "excessive." Appellants contend that having expressly acknowledged Zond's \$39,000 cost estimate prior to the initiation of relocation activities, and having repeatedly accepted, without objection, comparable cost estimates throughout the relocation process, BLM cannot be permitted to disallow such costs once the relocation was completed. (SOR at 21.)

Appellants contend that Zond's reliance on BLM's agreements, and BLM's receipt of the full benefit underlying such agreement, precludes BLM from denying the final rental waiver. Appellants point out that there is nothing in BLM's waiver denial to suggest that BLM had not received the benefits of the relocation that it had initially sought. (SOR at 22.)

Appellants assert that they performed their end of the agreement by relocating the Row One WTG's and that BLM, having received and acknowledged the valuable public benefit associated with the relocation, should not be permitted to deprive Appellants of their due compensation. (SOR at 26.)

Appellants request that the Board vacate BLM's Decision denying the rental waiver, direct BLM to approve a rental waiver in the amount of \$120,700 plus accrued interest from February 8, 1993 (the date the 1993 rental was deposited in the Account), and reimburse Zond in that amount. (SOR at 26-27.)

BLM did not file a response to Appellants' SOR.

[1] Section 504(g) of FLPMA, 43 U.S.C. § 1764(g) (1994), requires that the holder of a right-of-way pay the fair market rental value of the right-of-way. However, section 504(g) also provides authority for the Secretary to charge less than fair market rental value in certain specified circumstances. Included are those situations where "[t]he holder [of a right-of-way] provides without charge, or at reduced rates, a valuable benefit to the public or to the programs of the Secretary." 43 C.F.R. § 2803.1-2(b)(2)(ii). See Ruth Tausta-White, 127 IBLA 101, 103 (1993).

Here, BLM agreed to waive Appellants' rental in order to reimburse Appellants for their costs in relocating the Row One WTG's. Appellants relocated the WTG's, but BLM fell short of reimbursing Appellants for their costs by \$120,700.

Correspondence between Zond and BLM shows that BLM agreed to Zond's conditions for relocations. Specifically, by letter dated January 31, 1990, BLM informed Zond that it would issue a decision setting aside rental payments based upon the "actual costs associated with relocating WTGs from Row One." (SOR Ex. F.) By signing Zond's letter of March 22, 1990, BLM accepted the terms of the relocation. (SOR Ex. I.) Also BLM signed Zond's letter of August 28, 1990, thereby agreeing with Zond's estimated cost of the relocation project. (SOR Ex. J.) BLM never questioned the use of the 140-foot towers or objected to Zond's costs, prior to or during the course of the relocation project. It was not until after the completion of the project that BLM raised its objections. Nor did BLM indicate that Appellants were not carrying out the project in a reasonable manner.

In his December 1, 1993, memorandum, Kline, ADM, Division of Operations, indicated that the dispute over costs might not have arisen had there been sufficient project inspection throughout the duration of the relocation project. Kline made the following observations with respect to the data on the costs incurred for the Row One relocation project which Zond presented at the September 7, 1993, meeting:

With the design drawing that were [sic] provided by Zond the amount of costs associated with the towers, mechanical, and electrical still seem excessive. Without out [sic] proper project inspection as described below it is extremely difficult to argue the equipment and labor costs associated with these operations. So using the information provided by Zond no major discrepancies can be found in the costs. This is not to say that the costs are proper.

It must be noted that there was not sufficient project inspection throughout the duration of the project. Without this inspection it is extremely difficult to determine the amount of equipment and labor that was utilized throughout the project. Therefore, Zond had to provide this information. This is why project costs should be discussed prior to the start of the project. This way any disputes can be analyzed while the project is taking place enabling the project inspector to accumulate accurate equipment and labor utilization information. [2/]

2/ Kline also commented that there were stipulations against the original location of the Row One WTG's, but he did not elaborate on this. Also, there is no information in the case file indicating that BLM objected to the original location of the Row One WTG's.

At the conclusion of the project, the residents of the area expressed gratitude for BLM's efforts in securing Zond's cooperation in implementing the relocation. The residents commended BLM for serving "the public interest well by a series of actions that resulted in the restoration of natural beauty to the canyon for both residents and visitors to enjoy." (Letter of June 29, 1992, from James B. Mackenzie to BLM.) In our view, reimbursing Appellants for agreed-upon costs does not appear to be too high a price to pay for this benefit to the public.

BLM is directed to reimburse Appellants from rents otherwise due from Appellants in the amount of \$120,700. In the absence of express statutory authority, interest cannot be recovered against the United States upon unpaid accounts or claims. Gordon L. Hardy, 106 IBLA 227, 229 (1988); Amoco Production Co., 101 IBLA 152, 153 (1988), and cases cited therein. No such authority is offered by Appellants.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is reversed.

Will A. Irwin
Administrative Judge

I concur:

James L. Burski
Administrative Judge